

1 THE HONORABLE PARIS K. KALLAS
2
3
4
5
6

7 SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

8 ZANGO, INC.,

9 Plaintiff,

10 v.

11 KASPERSKY LAB, INC.,

12 Defendant.

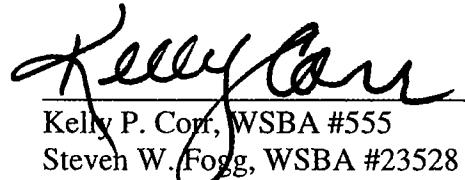
No. 07-2-16532-1 SEA

DECLARATION OF
RICHARD PURCELL

13 Attached hereto is the declaration of Richard Purcell.

14
15 DATED this 25th day of May, 2007.

16
17 CORR CRONIN MICHELSON
18 BAUMGARDNER & PREECE LLP

20 
21 Kelly P. Corr, WSBA #555
22 Steven W. Fogg, WSBA #23528
23 Attorneys for Plaintiff
24 Zango, Inc.

25 DECLARATION OF RICHARD PURCELL - 1

COPY

CORR CRONIN MICHELSON
BAUMGARDNER & PREECE LLP
1001 Fourth Avenue, Suite 3900
Seattle, Washington 98154-1051
Tel (206) 625-8600
Fax (206) 625-0900

1 The Honorable Cheryl Carey
2
3
4
5
6
7

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

8 ZANGO, INC.,

9 Plaintiff,

10 v.

11 PC TOOLS PTY LTD.,

12 Defendant.

No. 07-2-15844-8 SEA

**DECLARATION OF
RICHARD PURCELL**

13 Richard Purcell declares and states as follows:

14 1. I am Richard Purcell. I have personal knowledge of the matters stated herein
and I am competent to testify to these matters.

15 2. I am not an employee of plaintiff Zango, Inc. ("Zango").

16 3. I am the CEO of Corporate Privacy Group ("CPG"), which is a consulting
17 group dedicated to helping companies and government agencies protect the privacy of their
18 customers, particularly in the context of online and computer information. In my capacity as
19 CEO of CPG, I have advised Fortune 500 companies and government agencies about how to
20 respect and protect the personal information of consumers and other individuals. I have
21 attached a true and correct copy of a short biographical sketch as **Exhibit A** to this
22 declaration.

23 4. I am considered an expert in the field of consumer privacy. I was the first
24 person appointed to be Chief Privacy Officer for Microsoft Corporation. In that capacity, I
25

DECLARATION OF RICHARD PURCELL - 1

2 CORR CRONIN MICHELSON
3 BAUMGARDNER & PREECE LLP
4 1001 Fourth Avenue, Suite 3900
5 Seattle, Washington 98154-1051
6 Tel (206) 625-8600
7 Fax (206) 625-0900

1 developed, implemented and oversaw one of the world's largest and most advanced privacy
2 programs. Since leaving Microsoft in 2003, I have continued to help other companies and
3 government agencies develop privacy programs. I hold many significant privacy
4 appointments, including a position as a member of the Data Privacy and Integrity Advisory
5 Committee to the Department of Homeland Security.

6 5. Zango hired me (and CPG) to conduct an independent and objective audit of its
7 privacy practices. Under my direction, CPG conducted an exhaustive audit of Zango's
8 privacy practices, including thorough testing of Zango downloads in the "real world"
9 environment.

10 6. At the conclusion of our testing and review, CPG issued a report entitled
11 "Zango Compliance Review" ("CPG Report"). A true and correct copy of the CPG Report
12 (which was released on May 7, 2007) is attached as **Exhibit B** to this declaration.

13 7. As the CPG Report indicates, we found that Zango is fully compliant with all
14 reasonable and recommended privacy requirements. The three hallmarks of an acceptable
15 privacy program are a) user notification of the program or application's existence; b) user
16 consent to the download or installation of the program or application and c) user control of the
17 program or application. We concluded that Zango satisfies each of these criteria.

18 8. More specifically, we concluded that a) neither Zango nor its affiliates permit
19 installation of its programs without explicit user consent; b) users who download Zango
20 products are provided explicit notice about the program's capabilities and features and c)
21 users who download Zango products are provided easy-to-use and effective instructions and
22 methods for removing Zango products from their computers.

23 9. We were also satisfied that Zango's representation that all users who installed
24 Zango applications or products after January 1, 2006 did so consensually is accurate.

25 DECLARATION OF RICHARD PURCELL - 2

26 CORR CRONIN MICHELSON
BAUMGARDNER & PREECE LLP
1001 Fourth Avenue, Suite 3900
Seattle, Washington 98154-1051
Tel (206) 625-8600
Fax (206) 625-0900

10. As our report makes clear, we also verified Zango's representation that it communicates only with consumers who have installed Zango applications after January 1, 2006, and does not communicate with consumers who may have installed Zango products prior to January 1, 2006.

11. Our investigation also confirmed that Zango does not collect personally identifying information from its customers.

12. I am aware that a company named PC Tools distributes a scanning application named Spyware Doctor. I am further aware that Spyware Doctor informs computer users that Zango products are “malware” or an “infection” that is engaged in a “Malicious Action” that represents an “Elevated Risk.”

13. In my expert opinion, there is absolutely no basis for these characterizations. Zango products are not infections, viruses, malware or spyware. Zango products also do not present an elevated security risk. My investigation confirmed that Zango products are benign from a privacy or security standpoint.

14. I am also aware that Spyware Doctor deletes and destroys Zango products without providing the user any explicit notice that it is doing so. I am further aware that once Spyware Doctor deletes Zango's products from the user's computer, Spyware Doctor fails to provide the user with any instructions about how to restore Zango's products to the user's computer.

15. In my expert opinion, the practices described in paragraph 13 are unacceptable. Indeed (and somewhat ironically), PC Tools' practices are consistent with the very labels – malware and spyware – Spyware Doctor erroneously applies to Zango's products.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DECLARATION OF RICHARD PURCELL - 3

**CORR CRONIN MICHELSON
BAUMGARDNER & PREECE LLP**
1001 Fourth Avenue, Suite 3900
Seattle, Washington 98154-1051
Tel (206) 625-8600
Fax (206) 625-0900

1 DATED this 17 day of May, 2007 at Novellus Washington.

2
3 Richard Purcell
4 Richard Purcell

5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

DECLARATION OF RICHARD PURCELL - 4

CORR CHRONIN MICHILSON
BAUMGARDNER & FREECE LLP
1001 Fourth Avenue, Suite 1900
Seattle, Washington 98154-1051
Tel (206) 625-8600
Fax (206) 625-0900

EXHIBIT A

**Richard Purcell, CEO
Corporate Privacy Group**



Richard Purcell is a leading voice in addressing consumer privacy and data protection challenges, domestically and internationally.

In 2003, Mr. Purcell formed Corporate Privacy Group, an independent consulting firm focused on establishing sustainable, affordable privacy programs. Mr. Purcell advises Fortune 100 corporations and government agencies about achieving the twin goals of respecting and protecting personal information. Through seminars, lectures and writings, he promotes leading practices for consumer data protection and security.

In addition to CPG's program reviews and advice, their Web-based education curriculum, Privacy Directions™, has become a landmark offering. Designed to support corporations institutionalize privacy awareness, practices, and compliance throughout their employee base, Privacy Directions™ is widely deployed in the United States.

As Microsoft's original privacy officer, Mr. Purcell designed, developed, implemented and oversaw one of the world's largest and most advanced privacy programs, spanning software development, web deployment, infrastructure management, workforce management, and consumer data handling practices. His corporate office developed and monitored a distributed team of privacy managers throughout the enterprise, including global subsidiaries.

Mr. Purcell holds several significant privacy appointments. He was Chairman of TRUSTe for 2005-2006, currently sits on the Privacy Certification Advisory Board of the Int'l Association of Privacy Professionals, is a member of the Data Privacy and Integrity Advisory Committee for the Dept. of Homeland Security and a Fellow at the Ponemon Institute.

#####

For more information, contact Paula Purcell, Corporate Privacy Group, at 360.379.0762 or <mailto:info@corppriv.com>

<http://www.corporateprivacygroup.com>

EXHIBIT B

Corporate **PRIVACY** Group

A division of Three Fots, LLC

ZANGO COMPLIANCE REVIEW

PREPARED BY: CORPORATE PRIVACY GROUP

AUTHOR: RICHARD PURCELL

UPDATED: 07 MAY 2007

UPDATED: 07 MAY 2007

ZANGO COMPLIANCE REVIEW

FTC ORDER COMPLIANCE

COMPLIANCE REVIEW SCOPE

On 03 November 2006, Zango and the Federal Trade Commission settled charges related to Zango's software distribution practices. The order went into effect, after a public comment period and a Commission vote, on 07 March 2007. The agreement includes fifteen (15) sections of requirements. Zango hired Corporate Privacy Group (CPG) to oversee their compliance with the order; this report provides a review of that compliance effort to date.

The scope of the review and this report includes a sub-set of the agreement's requirements. The report covers Zango's compliance in several of the agreement's sections, including:

- Section I – no use of legacy programs to display advertising or communicate with a user's computer
- Section II – no use of security vulnerabilities to download or install software code, programs or content
- Section III – no installation of any software program or application without express consent
- Section IV – deployment and disclosure of a working customer complaint channel, linkage of complaints to correct software cause and prompt response to all complaints
- Section V – ensure that affiliates obtain express consent prior to any Zango software program or application, including identifying accountable persons in affiliate organizations, informing affiliates of program requirements, tracking all down-stream affiliate relationships, managing working complaint channels, promptly responding to complaints, and terminating those in breach of requirements
- Section VI – label all advertising served by program or applications to identify the source program spawning the advertising and the customer complaint channel, including links to instructions for program uninstall
- Section VII – make application removal procedures easy to find and use; make the procedure itself effective in removing the program without changing user computer settings or transferring personal information

The other sections of the agreement deal with additional requirements, including record keeping, fines, responsiveness, disclosure, change notification, and duration of the requirements. This report does not include these sections.

SUMMARY

Our review concludes that Zango complies with the requirements detailed in the sections of the agreement noted above.

CONFIDENTIAL

07 MAY 2007

We note that Zango currently deploys two versions of their User Consent Interface (UCI) that are materially the same, though with slight visual differences. Both forms have identical text and the use of the two forms has no material affect on our conclusion regarding compliance with the terms of the agreement.

NOTICE & DISCLOSURE

A primary purpose of the FTC agreement is to establish clear and conspicuous notice to consumers about the consequences of installing software applications onto their computers. Although no specific section details this requirement, it is included in definition #'s five (5) (clearly and prominently) and seven (7) (express consent). Zango has developed, implemented and deployed user notification for all of its software downloads that is unavoidable, explains in plain language that the application serves advertising, how it is served and how often, and how to remove the program. The notices also provide links to more information about the applications, Zango's privacy policy and frequently asked questions. The notice also presents the End User License Agreement in part, with scrolling capability to display more and links to view or print the entire EULA.

Zango must also cease all communications with consumers who have applications installed prior to January 2006. Zango has ceased all such communications.

FINDING

After thorough testing of the Zango.com site, during which we went through hundreds (out of thousands) of downloads, we found all instances of downloads, whether games, videos, utilities or screensavers to show one of two versions of the same disclosure screen.

We also tested several Zango partner sites, again examining the user experience to determine compliance with the "clear(ly) and prominent(ly)" disclosure requirements. We tested a number of partner sites, including:

- www.cheatgenius.co.uk
- www.1UO.net
- www.joblo.com
- www.newgrounds.com

We find that Zango complies with the Notice requirements required by the definition and under Section III of the agreement.

In addition, we have reviewed legacy installations of Zango software and found that Zango servers no longer communicate with or serve advertising to applications installed prior to January 2006. Therefore, we find that Zango is compliant with Section I of the agreement.

ADVERTISING NOTICE

In addition to disclosures prior to downloading and installing the Zango client software, the agreement requires clear labeling of all advertising served by the application, disclosing the application promoting the advertising and identifying the publisher. To this end, Zango clearly labels advertisements to show that the Zango application is responsible for the ad; additionally, a

UPDATED: 07 MAY 2007

the label displays a link that takes the user to the Zango Web site for more information, frequently asked questions, and instructions for removing the application.

In our testing, we found that, in rare cases, user intervention might remove ad labels from displayed advertising. This is a known anomaly requiring an ad that renders slowly and quick action by the user.

When serving advertising, Zango servers first post a browser window and frame to the user's computer. The advertiser sequentially and immediately serves the advertising content. In the vast majority of cases, the frame, ad label and advertising content appear to render simultaneously. However, when the ad content renders slowly, the browser window displays the Zango ad label framing a blank space. During the brief time that the window is blank, if the user clicks on the white space or changes the boundaries of the browser window, the action may cause the removal of the ad label. Finally, the latent advertising content may subsequently display in a framed window with no ad label. This is a known condition caused by Zango's appropriate response to user interaction with advertising windows.

The instances of user interaction with latent advertising displays are very rare; we found it difficult, though occasionally possible, to replicate.

FINDING

Despite the ability of users to remove ad labels by intervening with slow-rendering ads, we find Zango complies with Section VI of the agreement. We base our conclusion on the fact that Zango delivered ad labels as a component of the browser window for advertising content in all of our test instances. Though the label may be removed due to user intervention with the browser window, we note that this condition is rare and requires several factors to coincide, including slow-rendering ad content combined with quick action by the user.

EXPRESS CONSENT

Related to the requirement for Notice, the FTC agreement requires that Zango receive explicit (or express) consent from consumers prior to downloading and/or installing their software on the users' machines. Through our testing of the Zango.com site and downloads, we found a consistent and ubiquitous deployment of user consent mechanisms that required an explicit action by individuals prior to any download or installation routines. The screens Zango displays to consumers are unmistakably designed to gain express consent from users.

FINDING

Our tests of the Zango downloads showed that they are compliant with Section III of the agreement.

SECURITY EXPLOITS

The agreement makes clear that Zango cannot utilize exploits of known, unknown, or newly discovered vulnerabilities in software code to install their software. We have never received information accusing Zango of directly utilizing these exploits. There have been charges that unscrupulous affiliates may have bypassed computer security barriers to install Zango software silently.

CONFIDENTIAL

07 MAY 2007

We have interviewed the security staff at Zango, along with many of the technical staff, to investigate their responsiveness to identifying security exploits and correcting any deficiencies in their code base to prevent hacks, work-arounds, and other non-compliant actions.

FINDING

We find that Zango has reasonable protections for preventing the use of security vulnerabilities in aiding their installation. Zango deploys security resources to detect and mitigate security vulnerabilities in their code base, infrastructure and Web environment. Combined with the robust user Notice and Consent provisions noted above, we find that Zango is compliant with the requirements of Section II of the agreement.

CUSTOMER COMPLAINT CHANNEL

By definition, spyware loads silently and provides no remedy or help to the user to understand the applications function or to remove it from the computer. Adware, often lumped into the same category, has also been a platform for neglecting the consumers concern for control over their personal computers. Zango has had a working customer Inquiry and complaint channel for some time, striving to accommodate the many complaints users have about software appearing on their machines unbidden and resistant to efforts at removal.

Zango users, having installed their application under informed consent, have many opportunities to find information about the software, to file complaints, and to seek other remedies. Prior to download and/or installation, the user is able to link to information about the applications, including how they work and options for submitting questions and receiving answers.

Once installed, the Zango applications contain links from the user's computer to Zango customer support. From the user's 'tool tray', located at the bottom right of the screen, the Zango logo links provides links to:

- **Go to Library** – takes user to content library of games, video's, screensavers and utilities
- **Customer Support** – takes user directly to Web page with answers and feedback, including links to contact Zango with inquiries and/or complaints
- **License Agreement** – takes user to a locally-housed copy of the End User License Agreement (EULA) with a print function, which also contains contact links and information for customer inquiries and complaints
- **About Zango** – launches a locally-controlled window with information about Zango and a link to the Zango.com Web site

The Zango toolbar provides links to the customer inquiry and complaint mechanisms. Finally, advertisements served by the Zango program display appropriate labels (see above) that contain a link to the Customer Support Web page.

FINDING

Zango provides nearly unavoidable access to its consumer inquiry and complaint channel, supporting e-mail inquiries and both telephone and e-mail responses. We find that Zango's implementation of a consumer complaint channel satisfies the requirements of Section IV of the agreement.

UPDATED: 07 MAY 2007

CONSUMER CONTROL

The FTC has long held that consumers should be the final authorities over what software runs on the personal computers that they purchase and manage. To that end, Section VII of the agreement requires that Zango provide easy-to-use and effective instructions and methods for removing its software from users' computers.

FINDING

Zango promotes the removal of its software using the standard MS Windows utility called Add/Remove Programs. Zango fully informs users of the removal process with instructions posted in many places, including within the software applications and on the Zango Web site.

We have thoroughly tested the removal of the Zango Search Assistant and the Zango Toolbar from test machines and have found the complete and irrevocable removal of the program code in each instance. Thus, we find Zango compliant with the agreement's requirements in Section VII.

AFFILIATE CONTROLS

The agreement specifies a range of requirements, consistent with the requirements we reviewed here, that Zango must meet when engaging affiliates in the distribution of their software. Because Zango has terminated affiliate relationships, these requirements require no review at this time.

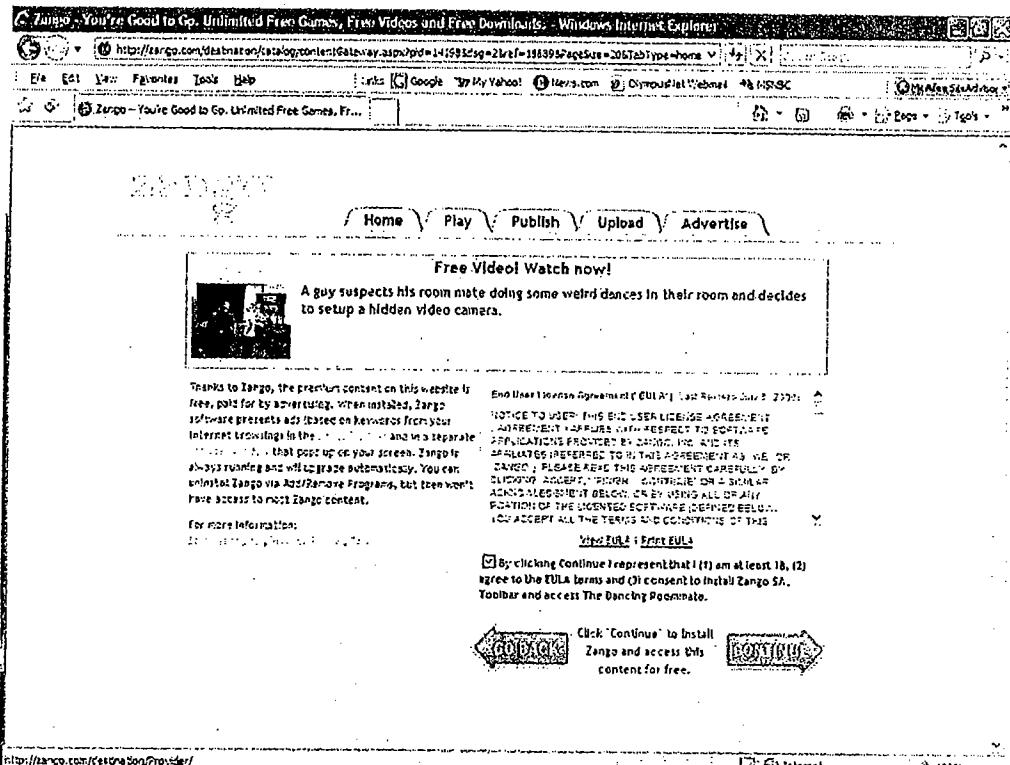
CONFIDENTIAL

07 MAY 2007

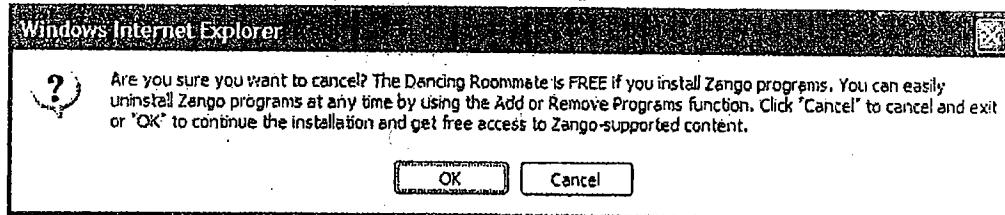
APPENDIX

ALL SCREEN SHOTS CAPTURED IN MAY 2007

User Consent Interface Screen A at www.zango.com

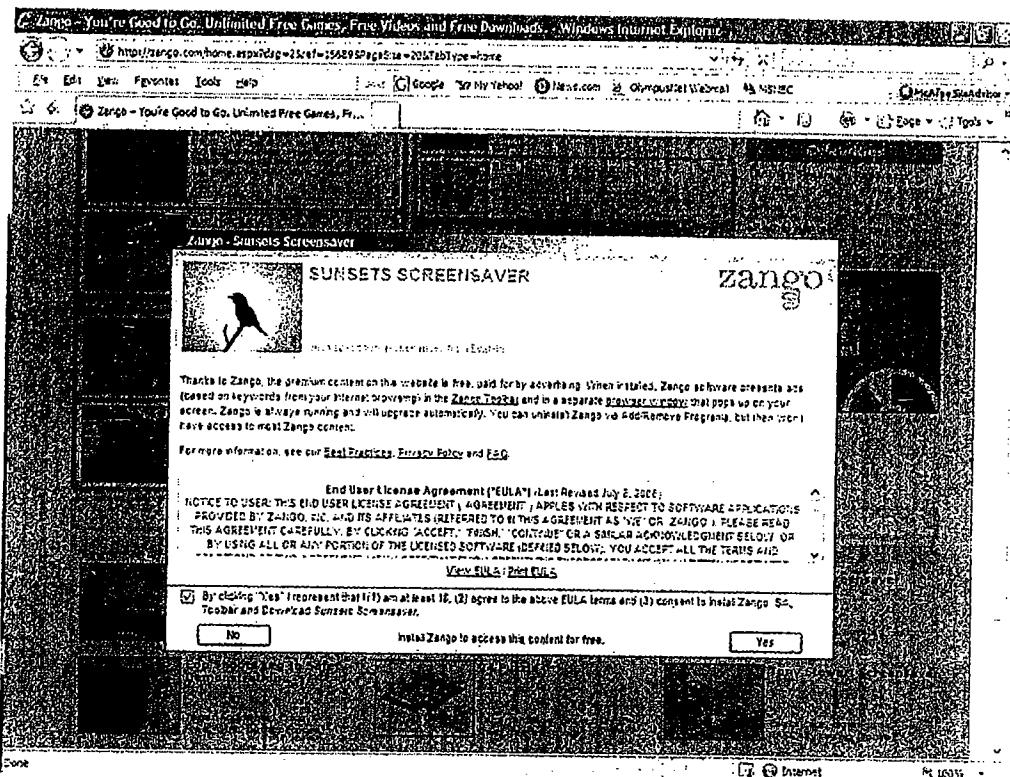


User clicks "Go Back" button, which pops another dialogue

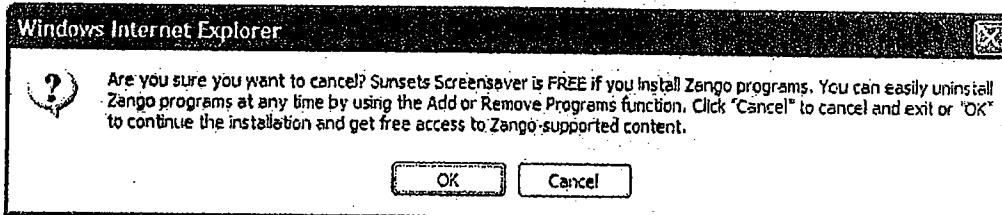


User clicks "Cancel" button and returns to Zango Content Library.

UPDATED: 07 MAY 2007

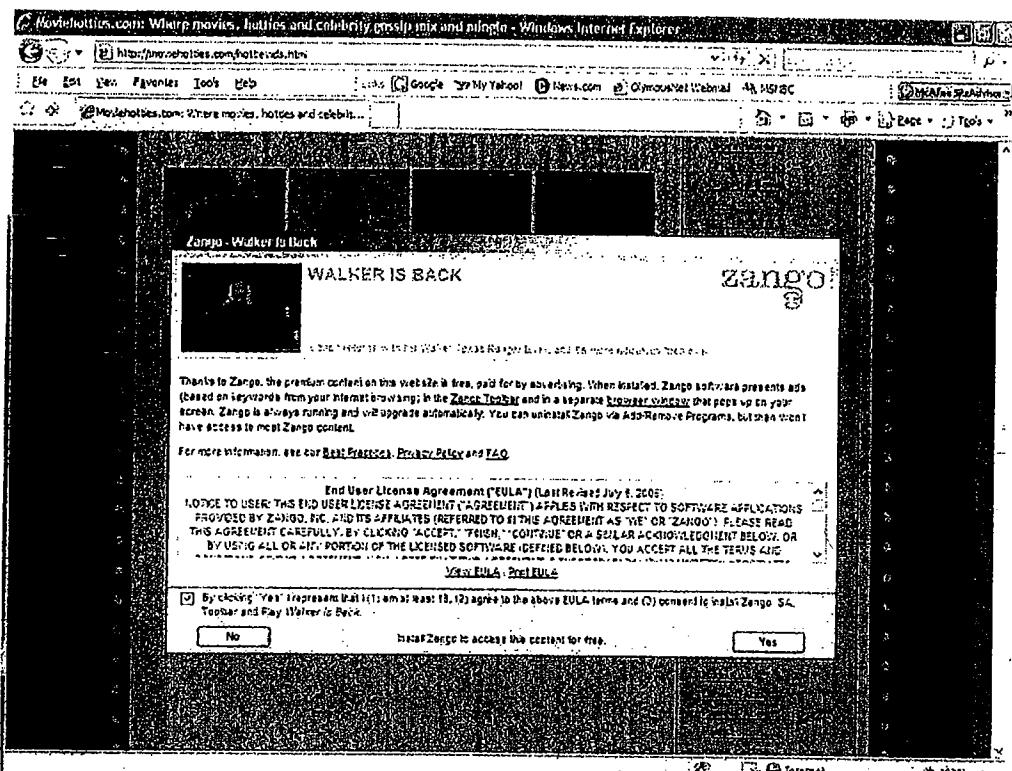
User Consent Interface Screen B at www.zango.com

Same sequence as noted in Screen A above, when user clicks 'No' button:

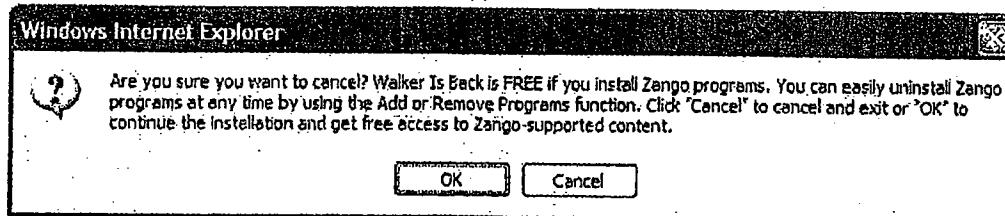


CONFIDENTIAL

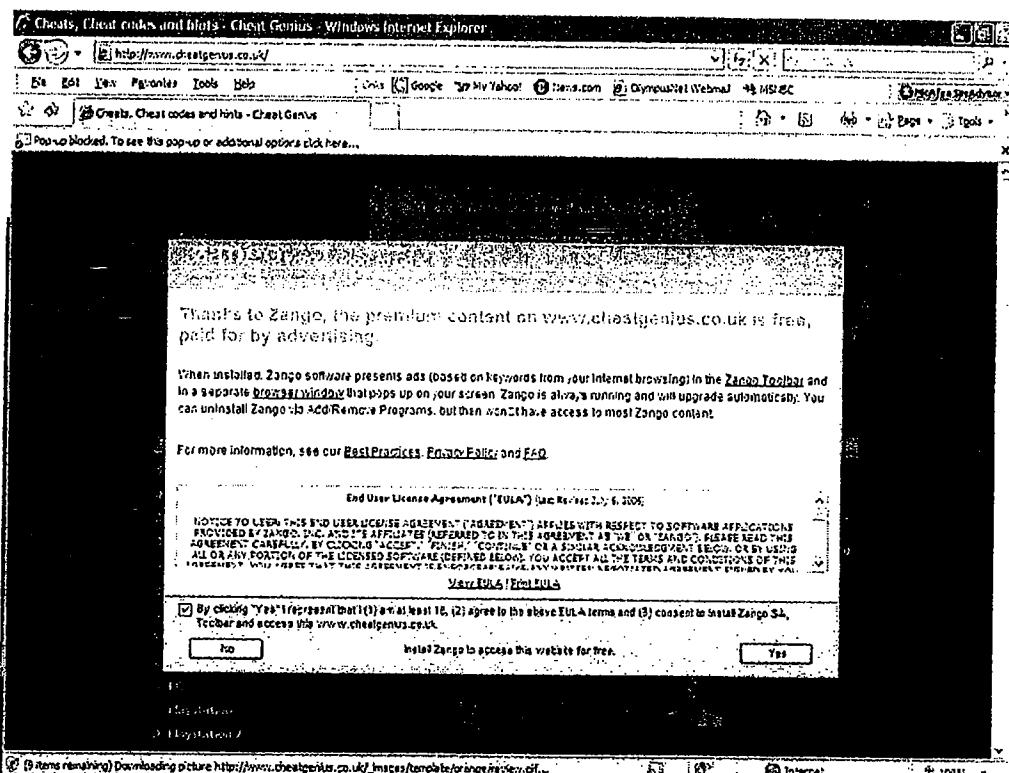
07 MAY 2007

User Consent Interface Screen at Partner site at www.joblo.com/hottievids.html

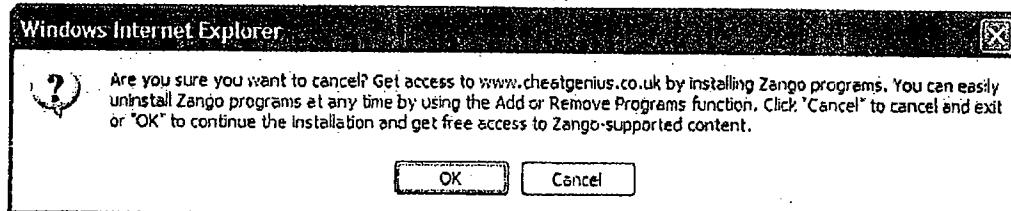
When user clicks 'No' button, this dialogue appears:



UPDATED: 07 MAY 2007

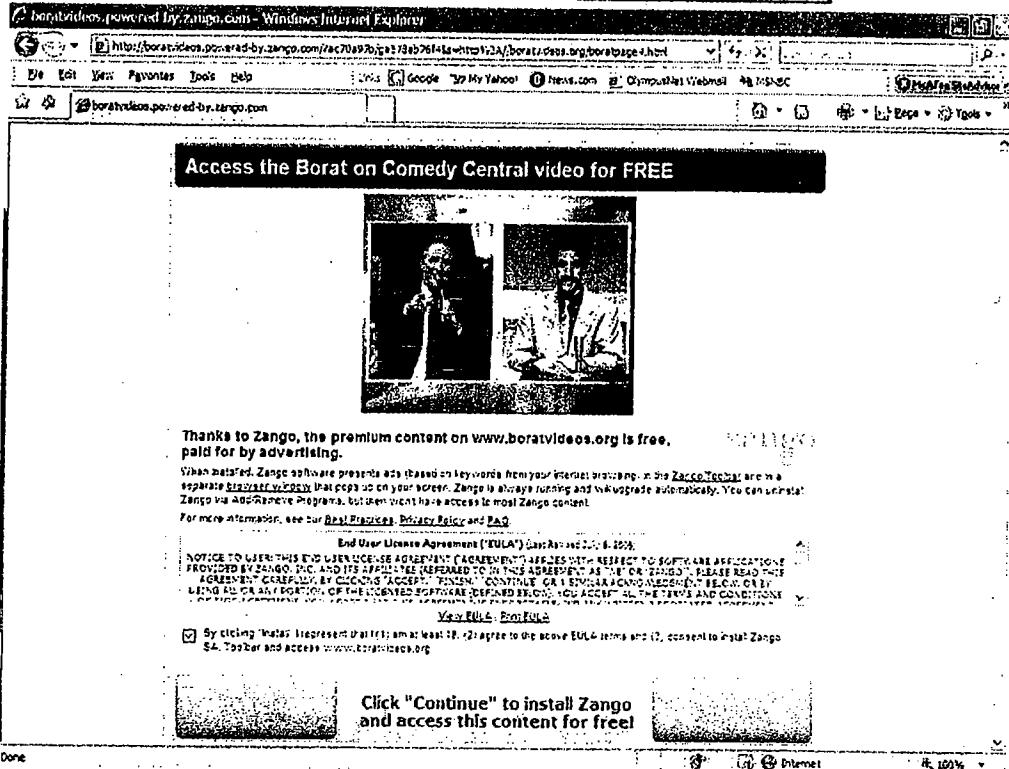
User Consent Interface Screen at Partner site at www.cheatgenius.co.uk

When the user clicks the 'No' button, this dialogue appears:

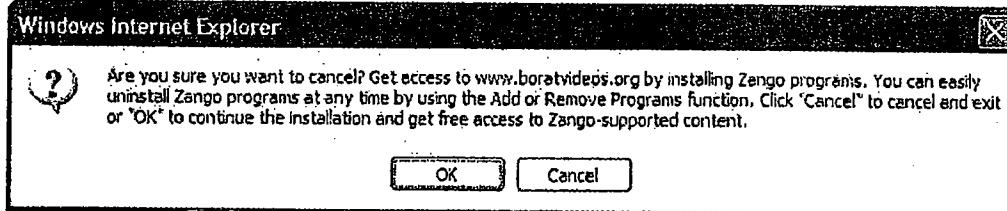


CONFIDENTIAL

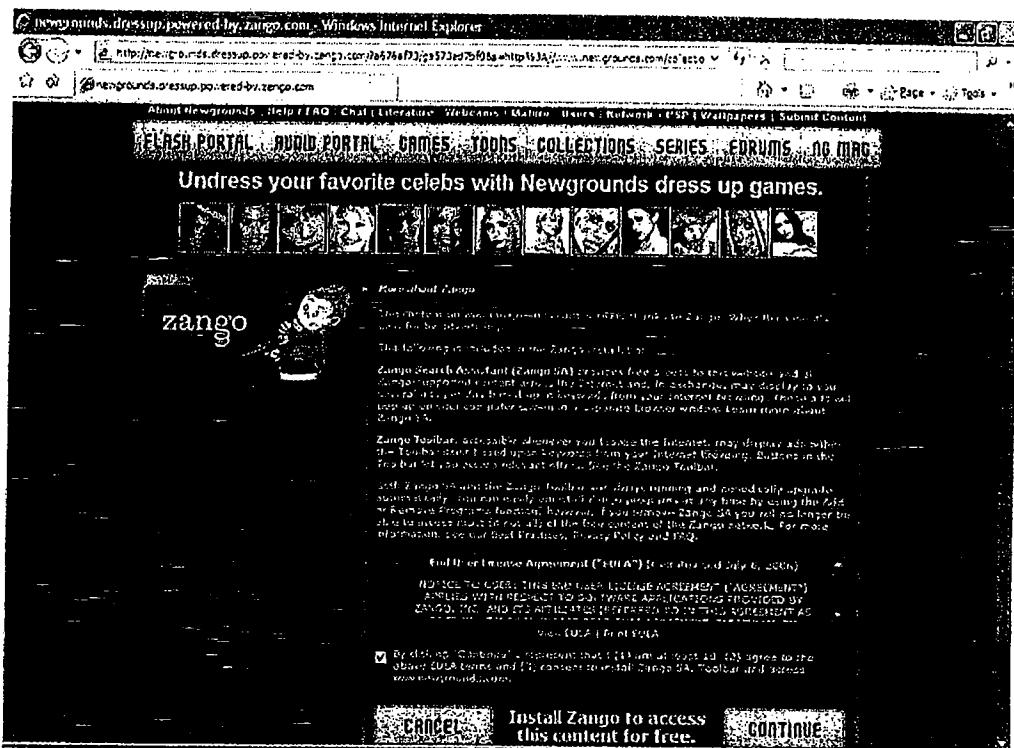
07 MAY 2007

User Consent Interface Screen at Partner site at www.boratvideos.org

When user clicks 'Cancel' button, this dialogue appears:



UPDATED: 07 MAY 2007

User Consent Interface Screen at Partner site at www.newgrounds.com

1 The Honorable Cheryl Carey
2
3
4
5
6
7

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

8 ZANGO, INC.,

9 Plaintiff,

10 v.

11 PC TOOLS PTY LTD.,

12 Defendant.

13 No. 07-2-15844-8 SEA

14 **AFFIDAVIT OF STEVEN W. FOGG RE:
15 FILING FACSIMILE SIGNATURE
16 (DECLARATION OF RICHARD
17 PURCELL)**

18 STATE OF WASHINGTON)
19) ss.
20 COUNTY OF KING)

21 Steven W. Fogg, being duly sworn, states:

22 1. I am one of the attorneys for Plaintiff in this matter. I have personal knowledge
23 of the facts stated below, and am competent to testify regarding the matters discussed herein.

24 2. Pursuant to GR 17(2), there is a facsimile signature on the accompanying
25 Declaration of Richard Purcell. A signed original will be filed as soon as possible. I have

AFFIDAVIT OF STEVEN W. FOGG RE: FILING FACSIMILE
SIGNATURE (DECLARATION OF RICHARD PURCELL) - 1

26 CORR CRONIN MICHELSON
27 BAUMGARDNER & PREECE LLP
28 1001 Fourth Avenue, Suite 3900
29 Seattle, Washington 98154-1051
30 Tel (206) 625-8600
31 Fax (206) 625-0900

32 ORIGINAL

1 examined the document, determined that it consists of six (6) pages, including these two (2)
2 affidavit pages, and thirteen (13) pages of exhibits and that it is complete and legible.

3
4
5 Steven W. Fogg
6

7 Signed and sworn to before me on May 17, 2007.
8

9 (Signature)
10

11 Joyce Lynn Abraham
12 (Name legibly printed or stamped)
13 Notary Public in and for the State of
14 Washington, residing at Seattle. My
15 appointment expires 10-27-07.
16
17
18
19
20
21
22
23
24
25



AFFIDAVIT OF STEVEN W. FOGG RE: FILING FACSIMILE
SIGNATURE (DECLARATION OF RICHARD PURCELL) - 2

CORR CRONIN MICHELSON
BAUMGARDNER & PREECE LLP
1001 Fourth Avenue, Suite 3900
Seattle, Washington 98154-1051
Tel (206) 625-8600
Fax (206) 625-0900